

1 Gabriela Gonzalez-Araiza (SBN: 320693)
2 gabriela@lkcfirm.com
3 **LEHOTSKY KELLER COHN LLP**
4 200 Massachusetts Avenue NW
5 Washington, DC 20001
6 (512) 693-8350

7 Attorney for *Amicus Curiae* the National Retail Federation

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10 MIGUEL LICEA, individually and on
11 behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 AMERICAN EAGLE OUTFITTERS
15 INC., a Delaware corporation; and
16 DOES 1 through 25, inclusive,

17 Defendants.

Case No. 5:22-cv-01702-MWF-JPR

**BRIEF OF *AMICUS CURIAE* THE
NATIONAL RETAIL
FEDERATION IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

Hearing Date: June 5, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
CORPORATE DISCLOSURE STATEMENT.....	1
INTEREST OF AMICUS CURIAE.....	1
ARGUMENT	4
I. Website chat features do not violate § 631(a)’s prohibition on wiretapping or eavesdropping.	4
A. Plaintiff has failed to show web chats violate § 631 because participants to a conversation do not violate that statute by reading communications sent to them.....	6
B. Plaintiff does not allege facts establishing that web chat features “tap” a “telegraph or telephone wire.”	7
C. Plaintiff fails to allege facts that chat communications were “intercepted” “while the same is in transit or passing over any wire.”	9
II. Plaintiff fails to state a claim that internet web chats violate § 632.7’s prohibition of intercepting or recording telephones conversations.	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Adler v. Community.com, Inc.</i> , No. 2:21-cv-02416-SB-JPR, 2021 WL 4805435 (C.D. Cal. Aug. 2, 2021).....	9, 11
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	4, 5, 10, 11
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	4, 6, 10, 11
<i>Byars v. Goodyear Tire and Rubber Co., et al.</i> , No. 5:22-cv-01358-SSS-KK, 2023 WL 1788553 (C.D. Cal. Feb. 3, 2023).....	15, 16, 17
<i>Byars v. Hot Topic, Inc. et al.</i> , No. 5:22-cv-01652-JGB-SP, 2023 WL 2026994 (C.D. Cal. Feb. 14, 2023).....	2, 3, 5, 6, 11, 12, 14, 15, 16, 17
<i>Byars v. Sterling Jewelers, Inc. et al.</i> , No. 5:22-cv-01456-SB-SP, 2023 WL 2996686 (C.D. Cal. Apr. 5, 2023)	2
<i>Calcano v. Swarovski N. Am. Ltd.</i> , 36 F.4th 68 (2d Cir. 2022)	5
<i>Cody v. Boscovs</i> , No. 8:22-cv-01434-SSS-KK, 2023 WL 2338302 (C.D. Cal. Mar. 2, 2023)	2
<i>Domondon v. First Franklin</i> , No. 2:16-cv-01277-JAK-MRW, 2016 WL 7479399 (C.D. Cal. June 23, 2016)	5
<i>Flanagan v. Flanagan</i> , 41 P.3d 575 (Cal. 2002).....	14

1	<i>In re Google Inc. Gmail Litig.</i> ,	
2	No. 5:13-md-02430-LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26,	
3	2013).....	17
4	<i>Graham v. Noom, Inc.</i> ,	
5	533 F. Supp. 3d 823 (N.D. Cal. 2021).....	13
6	<i>Hataishi v. First Am. Home Buyers Prot. Corp.</i> ,	
7	168 Cal. Rptr. 3d 262 (Cal. Ct. App. 2014).....	14
8	<i>Jang v. 1st United Bank</i> ,	
9	No. 2:11-cv-02427-JAM-GGH, 2012 WL 2959985 (E.D. Cal. July	
10	19, 2012)	5
11	<i>Kahn v. Outrigger Enters., Inc.</i> ,	
12	No. 2:13-cv-03802-SVW-JC, 2013 WL 12136379 (C.D. Cal. Oct.	
13	29, 2013).....	17
14	<i>Licea v. Caraway Home Inc. et al.</i> ,	
15	No. 5:22-cv-01791-JGB-SHK, 2023 WL 1999496 (C.D. Cal. Feb.	
16	9, 2023)	2, 3
17	<i>Licea v. Cinmar, LLC</i> ,	
18	No. 2:22-cv-06454-MWF-JEM (C.D. Cal. Mar. 7, 2023)	2, 7, 8, 9, 12, 14, 15
19	<i>Licea v. Old Navy, LLC</i> ,	
20	No. 5:22-cv-01413-SSS-SP, 2023 WL 3012527 (C.D. Cal. Apr.	
21	19, 2023)	2
22	<i>Ma v. Ashcroft</i> ,	
23	361 F.3d 553 (9th Cir. 2004).....	18
24	<i>Martinez v. Newsom</i> ,	
25	46 F.4th 965 (9th Cir. 2022).....	4
26	<i>Mastel v. Miniclip SA</i> ,	
27	549 F. Supp. 3d 1129 (E.D. Cal. 2021)	8, 9, 15
28	<i>Montantes v. Inventure Foods</i> ,	
	No. 2:14-cv-01128-MWF-RZ, 2014 WL 3305578 (C.D. Cal. July	
	2, 2014).....	16, 17
	<i>NovelPoster v. Javitch Canfield Grp.</i> ,	
	140 F. Supp. 3d 938 (N.D. Cal. 2014).....	9

1	<i>People v. Nakai,</i>	
2	107 Cal. Rptr. 3d 402 (Cal. Ct. App. 2010).....	18
3	<i>Powell v. Union Pac. R.R. Co.,</i>	
4	864 F. Supp. 2d 949 (E.D. Cal. 2012)	6
5	<i>Quigley v. Yelp, Inc.,</i>	
6	No. 3:17-cv-03771-RS, 2018 WL 7204066 (N.D. Cal. Jan. 22,	
7	2018).....	11
8	<i>Rodriguez v. Google LLC,</i>	
9	No. 3:20-cv-04688-RS, 2022 WL 214552, (N.D. Cal. Jan. 25,	
10	2022).....	11
11	<i>Rogers v. Ulrich,</i>	
12	125 Cal. Rptr. 306 (Cal. Ct. App. 1975).....	6
13	<i>Rosenow v. Facebook, Inc.,</i>	
14	No. 3:19-cv-01297-WQH-JLB, 2020 WL 1984062 (S.D. Cal. Apr.	
15	27, 2020).....	10, 13
16	<i>Saleh v. Nike, Inc.,</i>	
17	562 F. Supp. 3d 503 (C.D. Cal. 2021)	6
18	<i>Shayler v. 1310 PCH, LLC,</i>	
19	51 F.4th 1015 (9th Cir. 2022).....	5
20	<i>Starr v. Baca,</i>	
21	652 F.3d 1202 (9th Cir. 2011)	5
22	<i>In re Vizio, Inc., Consumer Priv. Litig.,</i>	
23	238 F. Supp. 3d 1204 (C.D. Cal. 2017).....	11
24	<i>Warden v. Kahn,</i>	
25	160 Cal. Rptr. 471 (Cal. Ct. App. 1979).....	7
26	<i>WildEarth Guardians v. Haaland,</i>	
27	561 F. Supp. 3d 890 (C.D. Cal. 2021)	4
28	<i>Williams v. What If Holdings, LLC,</i>	
	No. 3:22-cv-03780-WHA, 2022 WL 17869275 (N.D. Cal. Dec. 22,	
	2022).....	13

1	<i>Yale v. Clicktale, Inc.</i> ,	
2	No. 3:20-cv-07575-LB, 2021 WL 1428400 (N.D. Cal. Apr. 15,	
	2021).....	13

3 **Statutes**

4	Cal. Penal Code § 631(a).....	2, 3, 6, 7, 8, 9, 12, 13, 15, 16
5	Cal. Penal Code § 632.7(a).....	3, 14, 15, 16, 17, 18
6		

7 **Other Authorities**

8	Fed. R. Civ. P. 12(b)(6)	4
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 services. Plaintiff alleges that by reading written messages Plaintiff sent to a retailer
 2 via the chat feature, and storing those messages rather than immediately deleting
 3 them, the retailer has committed illegal wiretapping and eavesdropping in violation
 4 of the California Invasion of Privacy Act (“CIPA”). Plaintiff’s Second Amended
 5 Complaint fails to overcome the deficiencies noted in this Court’s order granting
 6 Defendant’s Motion to Dismiss the First Amended Complaint. *See* Order Granting
 7 Def.’s Mot. to Dismiss First Am. Compl., Dkt. #33. Instead, Plaintiff continues his
 8 tactic of making broad and vague allegations, which continue to be meritless. Rather
 9 than allow these claims to become an abusive tool wielded against retailers across
 10 the country, they should be dismissed with prejudice.

11 This Court has already dismissed a near-identical lawsuit against a different
 12 company. Order Granting Def.’s Mot. to Dismiss, *Licea v. Cinmar, LLC*, No. 2:22-
 13 cv-06454-MWF-JEM (C.D. Cal. Mar. 7, 2023) (Fitzgerald, J.), Dkt. #58 (“*Cinmar*”).
 14 However, in that case, rather than make a weak attempt at amending the complaint,
 15 plaintiffs voluntarily dismissed the action soon after this Court’s order. *See* Notice
 16 of Voluntary Dismissal, *Cinmar*, Dkt. #59.

17 Three other judges in the Central District of California have similarly
 18 dismissed copycat lawsuits against other companies in well-reasoned opinions. *See*
 19 *Byars v. Hot Topic, Inc. et al.*, No. 5:22-cv-01652-JGB-SP, 2023 WL 2026994 (C.D.
 20 Cal. Feb. 14, 2023) (Bernal, J.); *Licea v. Caraway Home Inc. et al.*, No. 5:22-cv-
 21 01791-JGB-SHK, 2023 WL 1999496 (C.D. Cal. Feb. 9, 2023) (Bernal, J.); *Byars v.*
 22 *Sterling Jewelers, Inc. et al.*, No. 5:22-cv-01456-SB-SP, 2023 WL 2996686 (C.D.
 23 Cal. Apr. 5, 2023) (Blumenfeld, J.); *Cody v. Boscovs*, No. 8:22-cv-01434-SSS-KK,
 24 2023 WL 2338302 (C.D. Cal. Mar. 2, 2023) (Sykes, J.) (dismissing with prejudice
 25 claims alleging Defendant’s direct liability under § 631(a), but granting Plaintiff
 26 leave to amend the remaining claims); *Licea v. Old Navy, LLC*, No. 5:22-cv-01413-
 27 SSS-SP, 2023 WL 3012527 (C.D. Cal. Apr. 19, 2023) (Sykes, J.) (dismissing with
 28 prejudice claims alleging Defendant’s direct liability under § 631(a), granting

1 Plaintiff leave to amend remaining § 631 claims, and denying Defendant's motion to
 2 dismiss Plaintiff's § 632.7 claims). In so doing, Judge Bernal perceptively described
 3 the tactics in this and related lawsuits:

4 [T]he Court acknowledges the central dynamic in this litigation,
 5 underscoring all of the deficiencies in the FAC: Plaintiff, and [his]
 6 counsel, Scott Ferrell, are serial litigants bringing numerous "cookie
 7 cutter" lawsuits under CIPA against various businesses that operate
 8 websites. . . . [W]hen the goal is to file as many lawsuits as possible in
 9 the least amount of time, it is far easier and cheaper to copy and paste
 10 a complaint over and over again, and to write the original template in
 11 such a way that hardly anything needs to be swapped out. Sometimes a
 12 plaintiff can get away with this, particularly if a defendant is willing to
 13 offer a quick cash settlement. But other defendants may not roll over so
 14 easily, and raise some fundamental questions, not least: Why is the
 15 entire complaint written at such a high level of generality that it could
 16 apply word-for-word to the dozens of other businesses this law firm is
 17 suing? And surely, whatever one's views on the propriety of copying
 and pasting from boilerplate pleadings, there is a point at which all
 reasonable people should agree the practice has gone too far. . . . The
 FAC is replete with evidence of cut-and-paste work, perhaps the most
 obvious of which is that it never mentions the name of the company
 Plaintiff is suing after the caption page, because doing so might take
 more than a few seconds to alter when filing a new lawsuit.

18 *Id.* at *4-5. After this ruling, the plaintiff in that case voluntarily dismissed her
 19 lawsuit in the *Hot Topic* case, and Plaintiff's attorney dismissed in two other copycat
 20 lawsuits also before Judge Bernal but persists in his litigation before other judges.
 21 *See* Notice of Voluntary Dismissal, *Licea v. Luxottica*, No. 5:22-cv-01826-JGB-KK
 22 (C.D. Cal. dismissed Feb. 14, 2023), Dkt. #26; Notice of Voluntary Dismissal, *Licea*
 23 *v. Caraway Home Inc.*, No. 5:22-cv-01791-JGB-SHK (C.D. Cal. dismissed Feb. 14,
 24 2023), Dkt. #21.

25 NRF members respect and protect the privacy of all their customers and
 26 website visitors. Vexatious lawsuits like this one do nothing to advance those
 27 privacy interests. Instead, they attempt to warp CIPA beyond recognition and do so
 28 in a way that threatens numerous businesses with civil and criminal liability simply

1 for using commonplace technology to communicate and serve customers in
 2 California. This Court has “broad discretion” to accept briefs of *amicus curiae* and,
 3 in general, “err[s] on the side of permitting such briefs.” *WildEarth Guardians v.*
 4 *Haaland*, 561 F. Supp. 3d 890, 905-06 (C.D. Cal. 2021) (internal marks omitted).
 5 Because this brief provides arguments that will be “useful” to the Court from
 6 *amicus*’s “unique . . . perspective,” *id.* (internal marks omitted), NRF files this
 7 *amicus curiae* brief in support of Defendant’s motion to dismiss Plaintiff’s second
 8 amended complaint.

9 ARGUMENT

10 **I. Website chat features do not violate § 631(a)’s prohibition on** 11 **wiretapping or eavesdropping.**

12 Plaintiff’s complaint must be dismissed because Plaintiff has “fail[ed] to state
 13 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a
 14 motion to dismiss, a complaint must contain sufficient factual matter, accepted as
 15 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
 16 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
 17 550 U.S. 544 (2007)). And the court is “not required to accept as true conclusory
 18 allegations which are contradicted by documents referred to in the complaint,” such
 19 as Defendant’s website and Privacy Policy. *Martinez v. Newsom*, 46 F.4th 965, 971
 20 (9th Cir. 2022) (internal marks omitted).

22 Plaintiff’s barebone allegations do not contain sufficient factual matter to
 23 survive a motion to dismiss. The requirement that a complaint contain plausible
 24 factual allegations is meant to prevent courts from being embroiled in claims like
 25 Plaintiff’s, which allege only non-specific hypothetical harms that can be duplicated
 26 in cookie-cutter lawsuits filed in courts across the State. *See Shayler v. 1310 PCH*,
 27
 28

1 *LLC*, 51 F.4th 1015, 1018 (9th Cir. 2022) (“A hallmark of abusive . . . litigation is
 2 the use of form complaints containing a multitude of boilerplate allegations of
 3 varying merit.”) (collecting cases); *Calcano v. Swarovski N. Am. Ltd.*, 36 F.4th 68,
 4 77 (2d Cir. 2022) (“Th[e] backdrop of Plaintiffs’ Mad-Libs-style complaints further
 5 confirms the implausibility of their claims of injury,” where plaintiffs had filed 81
 6 “essentially carbon-copy complaints.”); *Domondon v. First Franklin*, No. 2:16-cv-
 7 01277-JAK-MRW, 2016 WL 7479399, at *5 (C.D. Cal. June 23, 2016) (dismissing
 8 complaint that was a “‘cut and paste’ of similar complaints filed in other actions”);
 9 *Jang v. 1st United Bank*, No. 2:11-cv-02427-JAM-GGH, 2012 WL 2959985, at *2
 10 n.2 (E.D. Cal. July 19, 2012) (“Boilerplate or ‘cut and paste’ pleadings are strongly
 11 discouraged.”). NRF has a strong interest in ensuring its members are not subject to
 12 such lawsuits that fail to meet minimum pleading standards.

15 As Judge Bernal notes, “[t]he Ninth Circuit has clarified that (1) a complaint
 16 must ‘contain sufficient allegations of underlying facts to give fair notice and to
 17 enable the opposing party to defend itself effectively,’ and (2) ‘the factual allegations
 18 that are taken as true must plausibly suggest an entitlement to relief, such that it is
 19 not unfair to require the opposing party to be subjected to the expense of discovery
 20 and continued litigation.’” *Hot Topic*, 2023 WL 2026994, at *3 (quoting *Starr v.*
 21 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). Here, “[i]n a remarkable illustration of
 22 conclusory pleading,” Plaintiff makes allegations that Defendant directly violated
 23 CIPA § 631 and that Defendant aided and abetted a third party’s violation of § 631.
 24 *Id.* at *7. But, as shown below, Plaintiff fails to show almost any element of a § 631
 25 violation is met by everyday internet chats. As Judge Bernal helpfully summarized:
 26
 27
 28

At the end of the day, Twombly-Iqbal pleading standards might be distilled to a single proposition: if a litigant pleads at such a high level of generality that it is possible to copy and paste a complaint word-for-word against a new defendant (at least after the unnumbered “introduction” section, where Plaintiff’s Counsel has written the URL of the defendant of the day and referred to it as “the Website” so that he need not make a single other alteration to the rest of the complaint), then almost by definition he is pleading without the factual specificity necessary to state a claim for relief.

Id. at *5.

A. Plaintiff has failed to show web chats violate § 631 because participants to a conversation do not violate that statute by reading communications sent to them.

Plaintiff makes a broad claim that Defendant violates each prong of § 631 but provides *no* factual allegations in support of a wiretapping claim. Second Am. Compl., Dkt. #34, ¶ 33. But Plaintiff’s attempt to make a wiretapping claim fails anyway. Although § 631(a) prohibits secretly wiretapping or eavesdropping on a conversation, it cannot be applied to a participant to the conversation because “[i]t is never a secret to one party to a conversation that the other party is listening to the conversation; only a third party can listen secretly to a private conversation.” *Rogers v. Ulrich*, 125 Cal. Rptr. 306, 309 (Cal. Ct. App. 1975); *see also Hot Topic*, 2023 WL 2026994, at *7-10 (dismissing nearly identical § 631(a) claims against Hot Topic finding that the party exemption applied); *Saleh v. Nike, Inc.*, 562 F. Supp. 3d 503, 519 (C.D. Cal. 2021) (“[T]o the extent Plaintiff alleges [online retailer] recorded its own communications with Plaintiff, the court finds the § 631 [participant] exemption applies.”); *Powell v. Union Pac. R.R. Co.*, 864 F. Supp. 2d 949, 955 (E.D. Cal. 2012) (collecting cases that “are in accord that section 631 applies only to third parties and not participants”).

As Defendant explains, the sender of a communication necessarily consents to the intended recipient receiving the communication. Def.’s Mem., Dkt. #35-1, at 9-10. Plaintiff cannot state an “eavesdropping” or “wiretapping” claim under § 631 against Defendant for merely participating in a text-based conversation with Plaintiff. Nor can Defendant be held liable under § 631 for retaining the written conversation to which Defendant was a participant. *See Warden v. Kahn*, 160 Cal. Rptr. 471, 475 (Cal. Ct. App. 1979); *Cinmar*, Dkt. #58, at 11 (“California law is well settled that a party to the communication is not liable for recording their own conversation under section 631(a) . . .”). Thus, Plaintiff’s claim that Defendant is directly liable for violating § 631 must be dismissed.

B. Plaintiff does not allege facts establishing that web chat features “tap” a “telegraph or telephone wire.”

Despite this Court’s determination that § 631(a) “does not apply to communications with a smart phone or Wi-Fi-enabled laptop,” Plaintiff continues to make the same deficient factual allegations about the type of technology allegedly used by Defendant. *See* Order Granting Def.’s Mot. to Dismiss First Am. Compl., Dkt. #33, at 7-10. Section 631(a) prohibits only “taps” of “telegraph or telephone” wires, but Plaintiff’s alleged use of the chat feature involves only Plaintiff’s alleged use of a web browser on his smart phone and Defendant’s website chat communications. Second Am. Compl., Dkt. 34, ¶¶ 23-24.

Text-based communications over the internet between two computers have been held *not* to take place by “telegraph or telephone” via “wire, line, cable, or instrument” for purposes of § 631(a). *Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1134-35 (E.D. Cal. 2021); *see also* Def.’s Mem., Dkt. #35-1, at 7-8; *Cinmar*, Dkt.

1 #58, at 8-11 (dismissing plaintiff’s § 631(a) claims on the grounds that the first
 2 clause of 631(a) “does not apply to communications with a smart phone or Wi-Fi-
 3 enabled laptop”). This is true even if Plaintiff used a web browser from a smartphone
 4 to use the chat feature on Defendant’s website, because while smartphones “contain
 5 the word ‘phone’ in their name, and have the capability of performing telephonic
 6 functions, they are, in reality, small computers . . . that perform functions well
 7 beyond and unrelated to those of a telephone,” and Plaintiff’s allegations necessarily
 8 involve “a feature of the portion of the [smartphone] that functions as a computer,
 9 not the phone.” *Id.* at 1135-36; *see Cinmar*, Dkt. #58, at 9.

11 In *Cinmar* (and in its order on the previous motion to dismiss in this case),
 12 this Court soundly rejected Plaintiff’s arguments that § 631 applies to its alleged
 13 web chat communications both because of the plain text of the statute and
 14 (secondarily) because of its history. First, the Court noted that other “[c]ourts have
 15 consistently interpreted this clause as applying only to communications over
 16 telephones and not through the internet.” *Cinmar*, Dkt. #58, at 8 (collecting cases).
 17 *Cinmar* noted that not only has this been “the overwhelming weight of authority,”
 18 but also that courts have already rejected arguments “that a smart phone falls within
 19 the definition of telephone.” *Id.* at 9. Second, *Cinmar* explained that even though the
 20 “[p]lain interpretation [of the statute] and the case law dictat[ed]” the exclusion of
 21 Plaintiff’s communications, the statute’s history also confirms this result. *Id.* at 9-
 22 10. The legislature has amended the California Invasion of Privacy Act numerous
 23 times since it was enacted, including amending § 631 twice (in 2011 and 2022) and
 24 has not defined “telephone” to “appl[y] to all telephones which then includes internet
 25 technologies.” *Id.* at 10; *see also id.* (“Courts have consistently favored a narrow
 26
 27
 28

1 reading of [§ 631(a)] the first clause which the Legislature could have rejected
 2 through clarifying amendment.”). Plaintiff’s Second Amended Complaint merely
 3 rephrases the same allegations that previously failed—that Plaintiff used a smart
 4 phone to access the web chat feature—and adds that Defendant communicated via
 5 its website. Second Am. Compl., Dkt. 34, ¶¶ 23-24.

7 For these reasons, the website’s chat feature cannot be held to have violated
 8 § 631(a)’s wiretapping prohibition, and Defendant cannot be held liable directly or
 9 for aiding and abetting.

10 **C. Plaintiff fails to allege facts that chat communications were**
 11 **“intercepted” “while the same is in transit or passing over any**
 12 **wire.”**

13 Even if the second clause of § 631(a), unlike the first clause, applies beyond
 14 telephones and telegraphs, Plaintiff’s Second Amended Complaint fails to state a
 15 claim under the second clause because Plaintiff still fails to sufficiently state facts
 16 establishing the alleged eavesdropping occurred while the chat communication was
 17 “in transit.” Def.’s Mem., Dkt. #35-1, at 12-15. Failure to allege facts showing that
 18 the interception occurred while the communication was in transit defeats a CIPA
 19 claim. *See, e.g., Mastel*, 549 F. Supp. 3d at 1136-37; *Adler v. Community.com, Inc.*,
 20 No. 2:21-cv-02416-SB-JPR, 2021 WL 4805435, at *3-4 (C.D. Cal. Aug. 2, 2021)
 21 (Blumenfeld, J.); *NovelPoster v. Javitch Canfield Grp.*, 140 F. Supp. 3d 938, 951-
 22 54 (N.D. Cal. 2014).

24 This Court allowed Plaintiff the opportunity to amend because the First
 25 Amended Complaint “d[id] not adequately allege that [his] conversations were
 26 intercepted in transit.” *See* Order Granting Def.’s Mot. to Dismiss First Am. Compl.,
 27 Dkt. #33, at 15-18. And Plaintiff seems to attempt to cure these deficiencies by
 28

1 adding a few paragraphs about the third parties allegedly involved. Second Amended
 2 Compl., Dkt. 34, ¶¶ 13-20. But ultimately, Plaintiff still fails to adequately allege
 3 facts about the *interception* of the alleged communications.

4
 5 At most, Plaintiff provides only conclusory allegations rather than any facts
 6 about Defendant’s chat feature that would “support an inference that [Defendant]
 7 captured or redirected the contents of [Plaintiff’s] communications while in transit.”
 8 *Rosenow v. Facebook, Inc.*, No. 3:19-cv-01297-WQH-JLB, 2020 WL 1984062, at
 9 *7 (S.D. Cal. Apr. 27, 2020) (internal marks omitted). Plaintiff pleads generalized
 10 facts about how Defendant allows a “Third Party Spyware Company” to “embed
 11 code” and then shares that information with Facebook and Meta. *See* Second
 12 Amended Compl. ¶¶ 14, 20. Plaintiff then provides the bald conclusion that
 13 Defendant “allows [a] Third Party Spyware Company to secretly intercept in real
 14 time, eavesdrop upon, store, and transmit to Facebook all transcripts of Defendant’s
 15 chat communications with unsuspecting website visitors,” Second Amended Compl.
 16 ¶ 14. But stating that the interception occurs “in real time,” *id.*, or that the
 17 “correspondence is intercepted in transit,” *id.* ¶ 20, is insufficient to state a claim
 18 under *Iqbal* and *Twombly*, which “requires more than labels and conclusions”; “a
 19 formulaic recitation of the elements of a cause of action will not do.” *See Twombly*,
 20 550 U.S. at 555; *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a
 21 cause of action, supported by mere conclusory statements, do not suffice.”); *see*
 22 *Rodriguez v. Google LLC*, No. 3:20-cv-04688-RS, 2022 WL 214552, at *2 (N.D.
 23 Cal. Jan. 25, 2022) (“Using the word ‘intercept’ repeatedly is simply not enough
 24 without the addition of specific facts that make it plausible [Defendant] is
 25 intercepting [Plaintiff’s] data in transit.”); *In re Vizio, Inc., Consumer Priv. Litig.*,

1 238 F. Supp. 3d 1204, 1228 & n.9 (C.D. Cal. 2017) (“conclusory allegation that
2 [Defendant] intercepted [Plaintiff’s] electronic communications ‘during
3 transmission’” and “vague allegations about how [Defendant’s] data collection
4 occurs ‘in real time’” were insufficient to state a claim under CIPA and Wiretap
5 Act). Nor has Plaintiff alleged “how or when any defendant became aware of [her]
6 communications,” so as to “support an inference that an ‘interception’ took place.”
7 *Quigley v. Yelp, Inc.*, No. 3:17-cv-03771-RS, 2018 WL 7204066, at *4 (N.D. Cal.
8 Jan. 22, 2018); *see also Adler*, 2021 WL 4805435, at *4 (dismissing § 631 claim
9 where “there is no plausible allegation that Defendant acted to learn the contents of
10 the messages while they were, in a technical sense, in transit or in the process of
11 being received”).
12
13

14 Plaintiff’s mention of the third party’s role, is the epitome of conclusory
15 pleading. *See Hot Topic*, 2023 WL 2026994, at *10 (“Without alleging a single
16 specific fact in support of the contention that the third party ‘harvest[s] data for
17 financial gain,’ the [aiding and abetting] allegation is a mere conclusion disregarded
18 under *Twombly* and *Iqbal*.”); *see also Iqbal*, 556 U.S. at 679 (finding pleadings are
19 insufficient “where the well-pleaded facts do not permit the court to infer more than
20 the mere possibility of misconduct”); *Quigley*, 2018 WL 7204066, at *4 (dismissing
21 CIPA and federal wiretapping claims despite “vague references” to surveillance
22 because complaint did sufficiently “plead[] an unlawful interception of [her]
23 communications”).
24
25

26 As Judge Bernal explains with regard to Plaintiff’s previous allegations,
27 “Plaintiff has pled with nowhere near the specificity” required to state a claim, and
28 instead “Plaintiff appears to know nothing about the role that the third-party vendor

1 plays, because [he] does not even know what it is, let alone how it works.” *Hot Topic*,
2 2023 WL 2026994, at *10. Accordingly, “Plaintiff does not allege a single fact that
3 suggests the third-party intercepted and used the data itself.” *Id.* (citation and internal
4 marks omitted); *see also Cinmar*, Dkt. #58, at 14-15, 16 (finding plaintiff’s “bare
5 allegations” insufficient as to whether any third party used or intercepted data).
6 Instead, “Plaintiff’s Counsel has evinced an unmistakable intent to sue as many as
7 companies as possible in the shortest amount of time possible, seemingly without
8 doing the most basic homework on the entities he names as defendants.” *Id.* at *10.
9 Thus, Plaintiff does not even begin to state a claim for violation of § 631(a), which
10 would require as a starting place Plaintiff to allege such things as “precisely how
11 that software operates on Defendant’s Website,” “the ways in which data is shared
12 and used by Defendant and the third-party such that the latter ‘intercepts’ any
13 communications,” and “how specifically the third-party vendor ‘intercepts’
14 communications in transit, not just through accessing stored files after a
15 communication has concluded.” *Id.* at *13. Plaintiff’s Second Amended Complaint
16 continues to provide only conclusory allegations that a third-party “covertly
17 install[s] code” into Defendant’s chat feature, Second Am. Compl., Dkt. #34, ¶ 14,
18 but does not explain how it does so. Moreover, Plaintiff provides no explanation as
19 to how the “Third Party Spyware Company” “exploit[s], monetize[es and],
20 use[s] . . . the data it gathers through the chat feature.” *Id.* ¶ 19. A third party “that
21 provides a software service that captures its clients’ data, hosts it on [its] servers,
22 and allows the clients to analyze their data” acts as a “service provider” to and an
23 “extension” of Defendant, not an eavesdropper in violation of § 631(a). *Graham v.*
24 *Noom, Inc.*, 533 F. Supp. 3d 823, 832 (N.D. Cal. 2021); *see also Williams v. What If*
25
26
27
28

1 *Holdings, LLC*, No. 3:22-cv-03780-WHA, 2022 WL 17869275, *3 (N.D. Cal. Dec.
 2 22, 2022) (“[T]he question boils down to whether [the alleged third party] was an
 3 independent third party hired to eavesdrop on [defendant’s] communications, or
 4 whether [the alleged third party’s] software was merely a tool that [defendant] used
 5 to record its own communications with plaintiff.”); *Yale v. Clicktale, Inc.*, No. 3:20-
 6 cv-07575-LB, 2021 WL 1428400, at *3 (N.D. Cal. Apr. 15, 2021); *see also* Def.’s
 7 Mem., Dkt. #35-1 at 10-12.

9 This failure to state a claim alleging sufficient facts to show the chat feature
 10 constitutes an interception of communications while in transit warrants dismissal,
 11 both with respect to claims that Defendant directly violated § 631(a) and claims that
 12 Defendant aided or abetted such a violation by a third party. *See Rosenow*, 2020 WL
 13 1984062, at *7 (allegations under the federal Wiretap Act that Defendant “used an
 14 algorithm to intercept and scan Plaintiff’s incoming chat messages for content
 15 during transit before placing them in electronic storage” were conclusory and
 16 therefore dismissed).

18 **II. Plaintiff fails to state a claim that internet web chats violate § 632.7’s**
 19 **prohibition of intercepting or recording telephones conversations.**

20 Plaintiff fails to state a claim that Defendant violated § 632.7 because § 632.7
 21 only covers communications between two telephones and not, as alleged here, web
 22 chats between two computers. The plain text of the statute requires that the
 23 communication take place *between two telephones*. *See Hot Topic*, 2023 WL
 24 2026994, at *10 (dismissing identical § 632.7 pleadings, in part, because “[t]he
 25 unambiguous meaning of the statute is thus that it only applies to communications
 26 involving two telephones”); *Cinmar*, Dkt. #58, at 18-22, 21 (“[S]ection 632.7 only
 27
 28

1 applies to the five types of calls enumerated [in the statute, and] Plaintiffs do not
2 adequately allege a claim under section 632.7 because their pleadings do not allege
3 they communicated with Defendant using telephone technology.”). However,
4 Plaintiff’s allegations all pertain to textual web communications via Defendant’s
5 website chat feature between two computers.
6

7 In *Flanagan v. Flanagan*, the California Supreme Court explained that
8 § 632.7 was intended to “[r]espond[] to the problem of protecting the privacy of
9 parties to calls involving cellular or cordless telephones” as opposed to “landline
10 systems.” 41 P.3d 575, 581 (Cal. 2002) (internal marks omitted). Section 632.7 was
11 added to the statutory scheme to “protect[] against intentional, nonconsensual
12 recording of *telephone* conversations regardless of the content of the conversation
13 or the type of *telephone* involved.” *Id.* at 581-82 (emphases added). And the
14 California Courts of Appeal have confirmed that “determin[ing] what type of
15 telephone was used to receive the subject call” is an element of a § 632.7 claim.
16 *Hataishi v. First Am. Home Buyers Prot. Corp.*, 168 Cal. Rptr. 3d 262, 274 (Cal. Ct.
17 App. 2014).
18
19

20 Until very recently, no court had applied § 632.7 to web-based text chatting
21 between two computers, and to do so here would be a significant expansion of the
22 violations enumerated in the statute. As Judge Bernal noted in *Hot Topic*, the court’s
23 decision in *Byars v. Goodyear Tire and Rubber Co., et al.*, No. 5:22-cv-01358-SSS-
24 KK, 2023 WL 1788553 (C.D. Cal. Feb. 3, 2023) appears to be the first application
25 of § 632.7 to text-based communications on a website. *Hot Topic*, 2023 WL
26 2026994, at *11-12. Both *Hot Topic* and *Goodyear* involve identical § 632.7
27 pleadings to this case (except for the named Plaintiff, named Defendant, website,
28

1 and alleged third parties). However, the court in *Hot Topic* correctly diverged from
2 *Goodyear* in holding that Byars had not sufficiently alleged that both she and the
3 defendant had used a telephonic device. *Accord Cinmar*, Dkt. #58, at 21.

4
5 First, *Goodyear* incorrectly determined that plaintiff had sufficiently alleged
6 her own use of a telephonic device. *See Goodyear*, 2023 WL 1788553, at *5. By its
7 text, § 632.7 only applies to communications sent from a telephone and received by
8 a telephone. Plaintiff claims to have (maybe) used a smart phone's computer
9 function to access the web-based chat, Second Am. Compl., Dkt. #34, ¶ 23, but that
10 is not using a "cellar radio telephone" to communicate. Rather, Plaintiff is using a
11 computer to communicate and the fact that the computer can also function as a
12 cellular phone when used in a different way does not mean that the communication
13 is sent from a cellular phone. *Cf. Mastel*, 549 F. Supp. 3d. at 1135-36 (explaining
14 that § 631(a)'s prohibition on tapping a "telephone" does not include computer
15 communications, including such communications by smartphones); *see also Verizon*
16 *v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014) (noting that the internet is no longer
17 connected over telephone lines). For example, if Plaintiff had written a message on
18 a smartphone, printed the message on paper from the smartphone, and then mailed
19 the message, that would not qualify as a communication transmitted from a "cellular
20 radio telephone" for purposes of § 632.7.

21
22
23 And second, the *Goodyear* court incorrectly assumed that plaintiff had alleged
24 *defendant's* use of a telephone. *See Hot Topic*, 2023 WL 2026994 at *11-12; *contra*
25 *Goodyear*, 2023 WL 1788553, at *5 ("[T]here is no requirement that Byars allege
26 the *type* of telephonic device used by *Goodyear*") (emphasis added). Plaintiff
27 nowhere alleges that Defendant or a third party *received* Plaintiff's chats on a
28

1 telephone—a necessary element of a claim under § 632.7(a). Plaintiff only alleges
 2 that the chats took place via “telephony,” which, even if true (it is not),¹ is a word
 3 that is completely absent from the text of § 632.7 and does not meet the elements of
 4 the statute. Section 632.7 does not extend to all “telephony” communications, it
 5 applies specifically to “communication transmitted between . . . telephones”—
 6 namely, the specific types of telephones listed in the statute. *See Montantes v.*
 7 *Inventure Foods*, No. 2:14-cv-01128-MWF-RZ, 2014 WL 3305578, at *4 (C.D. Cal.
 8 July 2, 2014) (“According to this list of included types of telephones, the
 9 communication must have a cellular radio or cordless telephone on one side, and a
 10 cellular radio, cordless, or landline telephone on the other side.”). Moreover, the case
 11 *Goodyear* relied on, *McCabe v. Six Continents Hotels, Inc.*, No. 12-cv-04818 NC,
 12 2014 WL 465750, at *3 (N.D. Cal. Feb. 3, 2014), stands for a much narrower holding
 13 than *Goodyear* claims: that calls using Voice Over Internet Protocol (“VoIP”)
 14 technology might qualify as “telephonic” under § 632.7. *See Montantes*, 2014 WL
 15 3305578, at *7 (C.D. Cal. July 2, 2014) (finding plausibility “under the specific facts
 16 alleged” that defendant had *received* the calls using VoIP technology, which might
 17 ultimately be interpreted as included under § 632.7); *Kahn v. Outrigger Enters., Inc.*,
 18 No. 2:13-cv-03802-SVW-JC, 2013 WL 12136379, at *6-7 (C.D. Cal. Oct. 29, 2013).
 19 Judge Bernal correctly distinguished *McCabe* as involving a technology (VoIP) that
 20 is likely telephonic from this case, which involves a technology (webchats) that
 21
 22
 23
 24
 25

26 ¹ Plaintiff’s complaint contains no factual allegations supporting that text sent
 27 over the Internet necessarily involves “telephony” communication. Plaintiff merely
 28 provides a conclusory statement: “By definition, Defendant’s chat communications
 from its Website are transmitted to Website visitors by either cellular telephony or
 landline telephony.” Second Am. Compl., Dkt. #34, ¶ 24.

1 almost certainly does not involve messages received on a telephone, landline or
2 cellular. *Hot Topic*, 2023 WL 2026994, at *11-12.

3
4 Indeed, Plaintiff’s reading of CIPA would transform almost every adult in
5 California into a criminal and tortfeasor. By Plaintiff’s interpretation, every email
6 sitting in an inbox—or even this electronically-filed pleading, which was sent and
7 received over the internet—that an individual retains without the consent of all
8 parties would constitute an unlawful “recording” of a “communication”
9 “transmitted . . . by telephony.” So too with every text message sent between two
10 cell phones since, according to Plaintiff, they are sent by “telephony” and unless the
11 recipient immediately deletes them, they remain recorded on the cellphone usually
12 without the explicit consent of the sender. *Cf. In re Google Inc. Gmail Litig.*, No.
13 5:13-md-02430-LHK, 2013 WL 5423918, at *23 (N.D. Cal. Sept. 26, 2013) (in
14 rejecting § 632 claim, holding that “the communication was not being recorded
15 because email by its very nature is more similar to internet chats” and, “[u]nlike
16 phone conversations, email services are by their very nature recorded on the
17 computer of at least the recipient”); *Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836,
18 849 (N.D. Cal. 2014) (“California appeals courts have generally found that Internet-
19 based communications are not ‘confidential’ within the meaning of section 632,
20 because such communications can easily be shared by, for instance, the recipient(s)
21 of the communications.” (citing *People v. Nakai*, 107 Cal. Rptr. 3d 402, 418 (Cal.
22 Ct. App. 2010) (concerning internet chats)). Plaintiff’s absurd interpretation of
23 § 632.7(a) has only been accepted by one other court at the pleading stage and should
24 be dismissed by this Court. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)
25
26
27
28

1 (“[S]tatutory interpretations which would produce absurd results are to be
2 avoided.”).

3 **CONCLUSION**

4 For these reasons, the Court should grant Defendant’s motion to dismiss.
5

6 Respectfully submitted,
7

8 DATED: May 11, 2023
9

LEHOTSKY KELLER COHN LLP

10 /s/ Gabriela Gonzalez-Araiza
11 Gabriela Gonzalez-Araiza

12 *Counsel for Amicus Curiae*
13 *The National Retail Federation*
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

